

SERVED: May 5, 1999

NTSB Order No. EA-4760

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of April, 1999

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15285
v.)	
)	
DAVID M. HAYES,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent, pro se, appeals the August 18, 1998 order¹ of Administrative Law Judge Patrick G. Geraghty granting the Administrator's motion for summary judgment and affirming the order of suspension² charging respondent with violating

¹ A copy of the law judge's order is attached.

² The Administrator's complaint ordered a 90-day suspension of respondent's airman certificates, including his airline
(continued . . .)

sections 91.13(a) and 91.135(a), 14 CFR Part 91, of the Federal Aviation Regulations ("FARs").³ We deny the appeal.

The Administrator's complaint alleged that on November 23, 1997, respondent entered Class A airspace without an air traffic control ("ATC") clearance while acting as pilot-in-command of N100UE, a Beechcraft King Air, under visual flight rules ("VFR") near Longmont, Colorado. The complaint also alleged that respondent's actions caused a loss of separation between respondent's aircraft and a United Airlines Boeing 727. In his initial answer, respondent

(continued . . .)

transport pilot ("ATP") certificate, but waived sanction because of respondent's timely filing of a qualifying report under the Aviation Safety Reporting Program.

³ FAR §§ 91.13 and 91.135 provide, in relevant part, as follows:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

§ 91.135 Operation in Class A airspace.

. . . [E]ach person operating an aircraft in Class A airspace must conduct that operation under instrument flight rules (IFR) and in compliance with the following:

(a) *Clearance.* Operations may be conducted only under an ATC clearance received prior to entering the airspace.

* * * * *

admitted these allegations, but claimed there were "mitigating circumstances." However, when ordered by the law judge to provide a more definitive answer, respondent elaborated as follows:

[a]pproximately 2 seconds before jumper exit, Denver ATC, on 126.1, ordered 'stop jump and change to frequency 119.3.' When the radio was tuned to 119.3, the radio traffic on this frequency was continuous and did not allow request for clearance or notification that N100UE had inadvertently entered Class A airspace. . . . Radar "separation" may have been lost, but conditions were VMC and visual separation was maintained.

The Administrator filed a motion for summary judgment, arguing that respondent admitted the factual allegations and essential elements of both charges. Respondent filed a one-page brief which argued:

[t]his incident [i]nvolves a time critical series of events that resulted in the inadvertent penetration of Class A airspace. The respondent will use data supplied by the FAA and NOAA to show updraft conditions. The time critical events are specifically related to [skydiving] operations, i.e., unsecured passengers when close to exit time. This incident deserves a presentation to the Court, because of the many facets of the incident. Safe, logical decisions will be shown.

The law judge found summary judgment to be appropriate because the only factual issues -- the "mitigating circumstances" claimed by respondent -- were not material since they would only be relevant to a determination of sanction which, in this case, was waived. See Administrator

v. Friday, 6 NTSB 949, 951 (1989) ("our law judges should not undertake to determine what period of suspension would be appropriate for violations found proved where the Administrator has waived service of any suspension").

On appeal, respondent has not identified any material issue of fact raised by his answers to the complaint or his response to the Administrator's motion for summary judgment.⁴ Based on the record that was before him, we cannot say that the law judge erred in granting summary judgment.⁵

⁴ Respondent admitted facts indicating a violation of both section 91.13(a) -- for operation in Class A airspace without a clearance certainly creates potential endangerment to life and property -- and section 91.135(a). See Administrator v. Speroni, NTSB Order No. EA-4710 (1998) at 5 (potential endangerment sufficient for finding a violation of FAR section 91.13) (citing Hines v. DOT, 449 F.2d 1073, 1076 (D.C. Cir. 1971)). Under such circumstances, more than vague claims of exculpatory factors -- such as, for example, "updraft conditions" -- are necessary to demonstrate that summary judgment is not appropriate.

⁵ Respondent now asserts on appeal that "[a]n abrupt push-over of the aircraft" -- presumably to keep from entering Class A airspace or to avoid it after inadvertently entering it -- "could have caused serious injury to the unsecured skydivers or caused an uncontrolled exit from the aircraft that could have resulted in serious injury or death" and characterizes the situation as an "emergency." We view this claim as an affirmative defense that should have been pled before the law judge, but, in any event, we fail to see how the circumstances respondent belatedly alludes to could be viewed as justifying a diversion from regulatory requirements given his responsibility to avoid airspace he was not cleared to enter. See, e.g., Administrator v. Croasdale and Burke, NTSB Order No. EA-4317 (1995).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's Decisional Order granting summary judgment is affirmed; and
3. The Administrator's Order of Suspension with Waiver of Penalty is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.